Environmental Impact Assessment: what's it all about?

In this series of articles we explore the groundbreaking decision of the Supreme Court in Finch v Surrey County Council (2024) UKSC 20 ("Finch"). This first article will focus on the background, explaining what Environmental Impact Assessments (EIAs) are and the pending changes to the process. Later articles will consider the facts of Finch and decisions of the Supreme Court (both majority and dissenting) as well as the implications of the decision.

What are EIAs?

As part of the process of considering an application for planning consent where the underlying development is likely to have a significant impact on the environment, applicants are required to obtain an EIA. The purpose of the EIA is to ensure that, as part of the decision makers role, that there is sufficient scrutiny of the environmental impact of the relevant development. This is not to say that a development with a significantly detrimental environmental impact would automatically fail to achieve planning consent; rather it ensures that environmental impacts are considered when determining whether to grant planning consent.

The EIA procedure is currently enshrined in the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (the 2017 Regs) which are an implementation of EU law. The 2017 Regs apply the EU Directive 2011/92 (as amended) and the EU Directive 2014/52, which introduced, amongst other things, a specific requirement to consider Greenhouse Emissions (GHE). While the UK has left the EU a significant amount of EU derived legislation remains in full force and effect and that includes the 2017 Regs.

When do the 2017 Regs apply?

It is important to stress the EIA procedure and the 2017 Regs do not apply to all developments. The 2017 Regs specify the type of development that requires regulation by it. Schedules 1 and 2 of the 2017 Regs provide a list of EIA development, in summary:

Schedule 1 – an EIA is mandatory for development listed under this schedule, which may include large industrial and infrastructure development such as nuclear power stations, airports and the extraction of petroleum.

Schedule 2 – an EIA may be required for development listed under this schedule and the relevant question is whether the development is likely to give rise to significant environmental effects. The types of developments are widely interpreted and may include developments in the agricultural or food industry such as factories, wind farms, shopping centres and car parks.

The fact that a development may be within permitted development rights does not negate the application of the 2017 Regs.

What is an environmental impact?

For the purposes of the 2017 Regs a significant environmental effect of the proposed development may be on the population and human health, biodiversity, land, soil, water, air and climate change, material assets, cultural heritage and the landscape and the interactions between these factors. This includes any likely significant effects from the construction, existence and/or operational effects of the proposed development.

This is necessarily wide and while there are certain types of development which plainly fall to have an environmental impact for consideration, not every case is so clear cut. For that reason the 2017 Regs contain a screening process whereby a prospective applicant for consent can seek an EIA screening opinion from the local planning authority which will confirm, in that authority's opinion, the extent to which the 2017 Regs apply.

Process where the 2017 Regs apply

If, either due to the nature of the proposed development or as a result of a screening opinion, an EIA is to form part of the planning process, an environmental statement is required to accompany the application. This statement will contain all the information needed in order to enable an assessment of environmental impact to be carried out, including full details of the development, a description of the likely significant effects on the environment, details of any mitigation measures to be implemented to manage the environmental impact, the extent to which there is any alternative to the proposed development and, where there are alternatives to the proposed development the rationale behind the selected scheme over those alternatives.

The statement must be prepared by a suitably qualified expert. If a developer is not sure what should be included in the environmental statement they may seek a scoping opinion from the relevant local planning authority, which is sensible given the environmental statement is open to public scrutiny both by members of the public and statutory consultees (such as the Environment Agency and Natural England). The statement, together with all views communicated in relation to it, fall to be considered by the decision making body, whether it is the local planning authority or the secretary of state.

The importance of getting it right!

EIA challenges are not rare so getting it right is important as the consequences are a delay in the development coming forward and significant increased costs. The most common grounds for challenge are that the

development required an EIA, a failure to properly assess all relevant environmental factors in the EIA, a failure to adequately consult or a failure to take account of consultation responses.

Change is coming?

Part 6 of the Levelling Up and Regeneration Act 2023 (LURA) sets out the environmental outcomes report (EOR) process, which will require a written report that assesses the likely impact of certain types of development (likely to be akin to those listed in the 2017 Regs) on the 'delivery of specified environmental outcomes' and any proposals for mitigation and monitoring. Sounds familiar? Essentially, the EOR process is intended to replace the EIA process and it is the Government's aim to 'streamline' the environmental assessment process.

The power to make regulations took effect on the 26 December 2023 but no such regulations have been published so the intended changes are unlikely to be forthcoming any time soon. Much of the detail will be provided in the regulations but given the importance of such regulations it is expected that further consultation will be undertaken, particularly given the recent Finch decision. Lord Leggatt at para 21 of the Finch judgment reiterated the importance of public participation not only as part of the 'democratic legitimacy of decisions' but also to serve as an 'important educational function, contributing to public awareness of environmental issues'. Whilst specific to the EIA consultation process clearly it is a helpful reminder, and as Lord Leggatt rather brilliantly reminds us: 'You can only care about what you know about.'

Until next time!

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